

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)	4:04CR3088
)	
Plaintiff,)	MEMORANDUM
vs.)	AND ORDER
)	
FRANCISCO REYES RIVERA,)	
)	
Defendant.)	

This matter is before the court on the defendant's notice of appeal (filings 89, 90, 91), on the clerk's recent memo inquiring into the defendant's in forma pauperis status (filing 90), and on the defendant's motion for leave to appeal in forma pauperis (filing 93). The notice of appeal was filed with reference to the court's judgment of October 23, 2006 (filing 86), which denied the defendant's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (filing 83).¹

Before the defendant's appeal can proceed, a certificate of appealability must issue. See Fed. R. App. P. 22(b). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court has rejected a constitutional claim on the merits in the course of denying a § 2255 motion, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" in order to meet the standard contained in § 2253(c). Slack v. McDaniel, 529 U.S. 473, 484 (2000). In contrast, when a district court denies a § 2255 motion on procedural grounds without reaching the applicant's underlying constitutional claims on the merits, a certificate of appealability should

¹ Although the appeal appears untimely, the defendant recently inquired about the status of his § 2255 motion. (See filing 87.) In response, on February 28, 2007, the court mailed the defendant copies of its October 23, 2006 order and judgment.

issue under § 2253(c) when “the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Id.*

For the reasons set forth in the court’s memorandum and order on initial review, the court concludes that the defendant has not made a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c). Therefore, a certificate of appealability will not be issued.

While the clerk’s memo recites that the defendant has not been permitted to proceed in forma pauperis in the district court, he was determined to be financially unable to obtain an adequate defense in his criminal case, and an assistant federal public defender was appointed to represent him at trial. Because the appeal appears to be taken in good faith, even though a certificate of appealability will not be issued, the defendant may continue to proceed in forma pauperis pursuant to Fed. R. App. P. 24(a)(3). In any event, the defendant has demonstrated by his motion and supporting documentation that he is entitled to proceed in forma pauperis on appeal.

IT IS ORDERED that:

1. A certificate of appealability shall not issue in this case;
2. The defendant may proceed in forma pauperis on appeal; and
3. The clerk of the court shall transmit a copy of this memorandum and order to the United States Court of Appeals for the Eighth Circuit.

March 22, 2007.

BY THE COURT:

s/ *Richard G. Kopf*
United States District Judge